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# ***In the Supreme Court of the United States***

OCTOBER TERM, 1943

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No. 966

WARNER'S RENOWNED REMEDIES COMPANY,  
PETITIONER

v.

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA*

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**BRIEF FOR THE FEDERAL TRADE COMMISSION IN  
OPPOSITION**

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## **OPINION BELOW**

The opinion of the United States Court of Appeals for the District of Columbia (R. 273) is reported in 140 F. (2d) 18.

## **JURISDICTION**

The decree of the United States Court of Appeals for the District of Columbia was entered on February 5, 1944 (R. 274). The petition for a writ of certiorari was filed May 5, 1944. The jurisdiction of this Court is invoked under Section

5 of the Federal Trade Commission Act, as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether the order of the Commission prohibiting petitioner from advertising that its preparations have any therapeutic value in the treatment of sterility in women or in aiding the functioning of the female reproductive organs, is supported by adequate findings and evidence.

#### STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

\* \* \* \* \*

(c) \* \* \* The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

#### STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act the Commission issued an order directing petitioner to cease and desist from

disseminating in interstate commerce any advertisement making certain specified representations which the Commission had found to be false and misleading. The court below in a *per curiam* opinion held that the Commission's findings were "amply supported by the evidence" and affirmed the order (R. 273). The petition for certiorari seeks review of only those paragraphs of the order (1b, 1c, R. 20) which require the petitioner to refrain from representing that its preparations are of any therapeutic value in the treatment of any form of sterility in women or that they have any value in promoting the functioning of the female reproductive organs.

The Commission found that petitioner was selling three preparations concerning which it made a variety of false and deceptive representations as to their value in curing or overcoming female sterility (R. 11-13) and it found that the preparations will not "in any way overcome sterility" and that they have no value in "aiding the functioning of the female reproductive organs" (R. 17).

These findings were based on the testimony of eight experienced doctors, at least four of whom were specialists in gynecology.<sup>1</sup> They were ques-

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<sup>1</sup> As to the witnesses' experience and qualifications to testify, see R. 92-94, 108-109, 124-125, 142, 150-152, 158-159, 171, 181. As to specialization in gynecology, see R. 93-94, 124, 151, 158.

tioned concerning each of the statements made in advertising petitioner's remedies and were unanimous in testifying that, on the basis of accepted medical opinion, they were false or misleading or both. Concerning the statements as a whole, one doctor described them as "grossly misleading and untrue" (R. 105). Another doctor expressed the opinion that petitioner's Laxative Pills were definitely harmful, that "approximately fifty percent of the pregnant women would abort from the use of this powerful laxative pill" (R. 111-112).

#### ARGUMENT

Petitioner contends that, as to some of the ingredients in one of its preparations (Prescription No. 6), the testimony of Commission witnesses was merely that the value of these ingredients in overcoming sterility was undetermined, and that such evidence does not justify a finding that they are without value in treating this condition. We submit that no such issue is presented, that there was positive evidence that in the opinion of medical experts the ingredients were without value, either alone or in combination, in overcoming sterility. The evidence respecting vitamin E comes closest to supporting petitioner's contention that the efficacy of the ingredient is medically open and unsettled but the findings and evidence also show that, even if vitamin E were assumed to be efficacious, the quantity contained in petitioner's

preparation is wholly insufficient to be of value.<sup>2</sup>

Petitioner cites *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, as standing for the proposition that administrative tribunals are without authority to determine the falsity of any representation relating to a matter which lies within the realm of conjecture and opinion. We submit that the case is inapplicable because the therapeutic value of petitioner's preparations is within the field of medical knowledge and every material fact found by the Commission is supported by testimony of medical men of high standing. The courts have repeatedly sustained orders of the Commission directed against misrepresentation concerning the therapeutic value of medicinal preparations in cases where the findings of misrepresentation were based upon the testimony of medical experts.<sup>3</sup> Furthermore, the statute in-

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<sup>2</sup> Experiments have shown that vitamin E promotes fertility among rats held in captivity, but a comparable dose for human beings would be 300 of petitioner's pills a day (R. 15, 44), whereas the actual dose prescribed was six pills a day (R. 244). The cost of such a dose, using petitioner's preparation, would be more than \$8 a day. For a six-weeks' supply of its pills consisting of 252 pills (6 times 42 days), petitioner charges \$8 (R. 260).

<sup>3</sup> *Federal Trade Commission v. Raladam Co.*, 316 U. S. 149; *Aronberg v. Federal Trade Commission*, 132 F. (2d) 165, 169-170 (C. C. A. 7); *John J. Fulton Co. v. Federal Trade Commission*, 130 F. (2d) 85, 86 (C. C. A. 9), certiorari denied, 317 U. S. 679; *D. D. D. Corporation v. Federal Trade Commission*, 125 F. (2d) 679, 680-682 (C. C. A. 7); *Alberty*

volved in the *McAnnulty* case dealt with obtaining money through the mails by "false or fraudulent" pretenses or representations, whereas in a proceeding under Section 5 of the Federal Trade Commission Act, "innocence of motive" is no defense and the statute applies to "misrepresentation, however innocently made." *Federal Trade Commission v. Algoma Lumber Co.*, 291 U. S. 67, 81.

Petitioner also seems to contend (pet. 5, 7-8) that the Commission's order is in some respects broader than its findings. We deem it sufficient to point out that what may be termed the Commission's ultimate findings<sup>4</sup> are as broad as its order and these findings, since they are supported by evidence, should be accepted as conclusive.

#### CONCLUSION

The decision below is correct and there is no conflict of decision. It is therefore respectfully

*v. Federal Trade Commission*, 118 F. (2d) 669, 670 (C. C. A. 9), certiorari denied, 314 U. S. 630; *Neff v. Federal Trade Commission*, 117 F. (2d) 495, 497 (C. C. A. 4); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. (2d) 889, 891 (C. C. A. 7); *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. (2d) 988, 989 (C. C. A. 2), certiorari denied, 308 U. S. 616; *E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 77 F. (2d) 886, 887 (C. C. A. 2), certiorari denied, 296 U. S. 617.

<sup>4</sup> See last paragraph of Paragraph Two and last paragraph of Paragraph Five of the findings (R. 12-13, 17).

submitted that the petition for a writ of certiorari should be denied.

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MAY 1944.